Supreme Court, U.S.
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NO. 91-208

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ELAINE M. KITOWSKI, as Personal Representative of **THE ESTATE OF LEE WILLIAM MIRECKI,** deceased,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

Elaine M. KITOWSKI, as Personal Representative of the Estate of Lee William Mirecki, deceased,

Plaintiff,

vs. No: 90-30024 WEA

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM DECISION

In this case defendant moves to dismiss the complaint based on the absence of subject matter jurisdiction pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, or in the alternative for summary judgment (doc. 6).

Plaintiff has now filed a response in opposition thereto (doc. 11).

This action arises from the unfortunate death of Lee William Mirecki ("Mirecki"), an Airman Recruit in the United States Navy ("USN"). Mirecki died on March 2, 1988 while participating in sea rescue training at the Naval Air Station ("NAS") in Pensacola, Florida.

The circumstances surrounding his demise are not in dispute. Prior to his death Mirecki apparently had second thoughts about completing the rescue swimmer course. This program involves rigorous training

to prepare recruits for retrieving downed carrier based airmen under wartime conditions. During such training Mirecki requested that he be dropped from the course and not be forced to re-enter the pool. Instead of honoring his request, the instructors seized him and forced him back under water. He lost consciousness, and died shortly thereafter.

On January 25, 1990 suit was filed in this court by Elaine Kitowski, decedent's mother, as personal representative of his estate under the Federal Torts Claim Act ("FTCA"), 26 U.S.C. § 2671, et seq. The complaint alleges that Mirecki's demise was wrongful and proximately caused by defendant's negligence, and seeks $5,000,000 in compensatory damages.

Defendant seeks dismissal of the complaint, or alternatively for summary judgment, on grounds that this action is barred by the *Feres* doctrine. *See Feres v. U.S.*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). In *Feres, supra,* the court held that actions under the FTCA brought by active duty military personnel are barred where the injuries complained of "arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 157, 95 L.Ed. at 153. Under such circumstances this court has no jurisdiction to hear the case, and dismissal rather than summary judgment is the proper disposition. *Stanley v. Central Intelligence Agency,* 639 F.2d 1146 (5th Cir. Unit B 1981) (only correct disposition of FTCA claim barred by *Feres* doctrine is dismissal for lack of subject matter jurisdiction, not summary judgment).

Defendant straight forwardly contends that suit is barred by the *Feres* doctrine because decedent was an active duty member of the USN who died while engaged in training at NAS.

Plaintiff presents a more lengthy statement of her position. First, she contends that *Feres, supra,* does not apply because decedent withdrew from naval service just before his death, therefore he was not on active duty when the injury was inflicted. Second, she urges the court to disregard the law because the "facts of this case are

so far beyond human decency . . . ". Plaintiff's Memorandum in Opposition to the Motion to Dismiss at p. 48. Finally she argues that this judicially created exception to the waiver of sovereign immunity provided by the FTCA is unjust and should be overruled.

The doctrine established in *Feres, supra,* has been consistently followed and expansively applied by the United States Supreme Court for over forty years. *See U.S. v. Johnson,* 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987); *U.S. v. Shearer,* 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985); *Chappell v. Wallace,* 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983); *U.S. v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); *U.S. v. Brown,* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954).

The law is clear. An active duty member of the armed forces injured on a military base while engaged in the performance of his or her duties cannot sue the United States. *Feres, supra.*

In this case the undisputed facts establish that decedent was on active duty participating in training exercises at NAS when the fatal injury was inflicted, and thus injuries were obviously incident to his duties in the USN. In addition, the alleged tortfeasors were also on active duty conducting training within the scope of their official duties. Under these circumstances, this action is barred. Indeed, the *Feres* doctrine has been consistently held to apply in far more debatable factual situations. *See e.g., Johnson, supra* (*Feres* doctrine barred negligence action where alleged negligence was that of civilian federal employees and not military personnel reversing decision of the Eleventh Circuit that suit was not barred); *Bowers v. U.S.*, 58 LW 2721 (8th Cir. 6/1/90) (*Feres* doctrine bars action based on negligently conducted pre-induction physical performed by military physician); *Kopcho v. U.S.*, 58 LW 3828 (3d Cir. 3/16/90) (negligence action filed by active duty service person injured in auto accident on military base while off-duty doing personal errands barred by *Feres* doctrine).

Nevertheless, plaintiff contends that decedent was no longer a member of the USN on active duty when the injury occurred. She

argues that he had a unilateral right to drop the course and resign from the service. Yet, as plaintiff acknowledged, his right to withdraw was contingent on the present intent to resign and signing of the appropriate discharge papers. Plaintiff's Memorandum In Opposition to the Motion to Dismiss at p.29. The latter was never accomplished. Thus decedent's status did not change prior to his death. Nor were such circumstances tantamount to discharge as they were in the cases cited by plaintiff. *Compare Harvey v. U.S.*, 884 F.2d 857 (5th Cir. 1989) (member of service on medical hold with disability not part of active service); *Adams v. U.S.*, 728 F.2d 736 (5th Cir. 1984) (service man not receiving pay from the Army on indefinite excess leave); *Bankston v. U.S.*, 480 F.2d 495 (5th Cir. 1973) (genuine issue of material fact existed whether decedent had been discharged where decedent had received no further orders, salary or other compensation prior to infliction of injuries).

Plaintiff also urges this court to disregard the law and to overrule the *Feres* doctrine and hold that Mirecki's death was not incident to service based on the egregious nature of the facts in this case. This the court declines to do. Binding precedent in this circuit has upheld the applicability of the *Feres* doctrine under equally egregious circumstances. *See, e.g., Stanley, supra* (claim of serviceman subjected to chemical warfare experimentation allegedly without his informed consent barred by *Feres* doctrine).

The court is not without sympathy for decedent's family, and is mindful of the fact that the instructors involved in this tragedy may well have acted wrongfully. Nonetheless, the law is clear and the court is obligaged to apply it. If present law is unjust or unfair, then plaintiff must seek her remedy elsewhere than in this court.

In light of the foregoing, the court concludes that this action is barred by the *Feres* doctrine. Accordingly, plaintiff's claims should be and will be dismissed for lack of subject matter jurisdiction, and at plaintiff's cost.

DATED this 9th day of August, 1990.

WINSTON E. ARNOW, Senior Judge